U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAULETTE M. WAGNER and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA

Docket No. 97-2210; Submitted on the Record;
Issued April 5, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained a recurrence of total disability on January 18, 1995 causally related to her July 22, 1994 employment injury; and (2) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on her actual earnings in a modified electronics mechanic position.

On July 22, 1994 appellant, then a 29-year-old electronics mechanic, sustained a fractured coccyx and a lumbar strain in the performance of duty. She stopped work on July 27, 1994 and returned to work on September 14, 1994. Following her return to work, she was placed in a modified electronics mechanic position.

Effective January 18, 1995, appellant was terminated from her position at the employing establishment due to a reduction-in-force (RIF) (insufficient work available in Shop 67).

In a report dated September 19, 1995, Dr. J. Abbott Byrd, III, a Board-certified orthopedic surgeon, indicated that appellant could perform light-duty work and he provided a list of work restrictions.

On September 20, 1995 appellant filed a claim for a recurrence of disability on January 18, 1995 which she attributed to her July 22, 1994 employment injury.

In reports dated October 2 and 12, 1995, Dr. Ganesh Bissram diagnosed a lumbosacral strain and indicated by checking the block marked "yes" that the condition was causally related to appellant's July 22, 1994 employment injury. He indicated that appellant might be able to perform modified work that did not require heavy lifting, bending or squatting.

By decision dated January 30, 1996, the Office denied appellant's claim for a recurrence of disability on the grounds that the medical evidence of record failed to establish that her claimed disability was causally related to her 1994 employment injury.

By letter dated February 19, 1996, appellant requested reconsideration.

By decision dated July 26, 1996, the Office vacated its January 30, 1996 decision. The Office stated that, since appellant had performed light-duty work for approximately four months, until her employment was terminated by a reduction-in-force (RIF) at the employing establishment, her employment fairly and reasonably represented her wage-earning capacity. The Office stated that appellant still had residuals of her July 22, 1994 injury at the time her employment was terminated effective January 18, 1995 but she was not entitled to lost wages because she stopped work due to a RIF.

In a second decision dated July 26, 1996, the Office determined that appellant's reemployment in the modified electronics mechanic position effective September 14, 1994 fairly and reasonably represented her wage-earning capacity and that she had no loss of wage-earning capacity as she was earning the same wages in her modified position as she had received in her regular date-of-injury position.[1] The Office applied the principles enunciated in *Albert C. Shadrick*,[2] and determined that appellant's pay rate when disability began was $576.00 per week; that the current pay rate for that same position was $576.00 per week; and that her light-duty position paid $576.00 per week, resulting in no loss of wage-earning capacity.

By letter dated August 22, 1996, appellant requested an oral hearing before an Office hearing representative.

On February 27, 1996 a hearing was held before an Office hearing representative at which time appellant testified.

By decision dated April 28, 1997, the Office hearing representative affirmed the Office's two July 26, 1996 decisions.

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained a recurrence of total disability on January 18, 1995 causally related to her July 22, 1994 employment injury.

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish, by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[3] In the instant case, appellant has failed to establish either a change in the nature or extent of her light-duty requirements or a change in her accepted injury-related condition.

[1] The record shows that appellant was earning $14.40 per hour at the time of her 1994 employment injury.

[2] 5 ECAB 376 (1953).

[3] *See Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Stuart K. Stanton*, 40 ECAB 859, 864 (1989).

In this case, the record shows that appellant sustained an injury in the performance of duty and that on January 18, 1995 her light-duty position was terminated due to a RIF. Appellant subsequently filed a claim alleging a recurrence of total disability on January 18, 1995 which she attributed to her 1994 employment injury and she submitted medical evidence in support of her claim.

In a form report dated September 19, 1995, Dr. Byrd, a Board-certified orthopedic surgeon, indicated that appellant could perform limited-duty work. As he did not indicate that appellant was totally disabled, this report does not support her claim of an employment-related recurrence of total disability or that she stopped work on January 18, 1995 due to residuals of her accepted condition.

In reports dated October 2 and 12, 1995, Dr. Bissram diagnosed a lumbosacral strain and indicated by checking the block marked "yes" that the condition was causally related to appellant's July 22, 1994 employment injury. He indicated that appellant might be able to perform modified work that did not require heavy lifting, bending or squatting. Since he did not opine that appellant was totally disabled, this report is not sufficient to discharge her burden of proof.

Appellant stopped work on January 18, 1995 due to a RIF. When a claimant stops working at the employing establishment for reasons unrelated to her employment-related physical condition, she has no disability within the meaning of the Federal Employees' Compensation Act.[4] The Office's procedures provide that a recurrence of disability does not include a situation where an employee stops work due to a RIF where employees performing full duty as well as those performing light duty are affected.[5] In this case, the record shows that the employing establishment's RIF action was due to insufficient work available in Shop 67 where appellant worked. Appellant's work stoppage was not due to a withdrawal of her specific light-duty assignment by the employing establishment and does not constitute a recurrence of disability under the Office's procedures.[6]

As appellant failed to submit rationalized medical evidence establishing that her claimed recurrence of total disability on January 18, 1995 was causally related to the accepted employment injury, the Office properly denied her claim.

The Board further finds that the Office properly determined that appellant had no loss of wage-earning capacity based on her actual earnings as a modified electronics mechanic.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[7] The

[4] 5 U.S.C. §§ 8101-8193; *John W. Normand*, 39 ECAB 1378, 1381 (1988).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997); *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.12 (July 1997).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(4) (May 1997).

[7] *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

Office met its burden in this case. Section 8115(a) of the Act provides that the wage-earning capacity of an employee is determined by her actual earnings if the earnings fairly and reasonably represent her wage-earning capacity.[8] The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[9] The Office's procedures provide for a retroactive determination where an employee has worked for at least 60 days and the work stoppage following that date was not due to an employment-related condition.[10]

In the instant case, appellant had actual earnings as a modified electronics mechanic beginning September 14, 1994 and continuing until January 18, 1995, the date that her position was terminated due to an employing establishment RIF, at a pay rate equal to the pay rate of the position held at the time of her injury. The Office thus properly determined that appellant had no loss of wage-earning capacity.[11] As noted above, the record does not establish that appellant's work stoppage was due to her employment injury. The record shows that her position was terminated due to a RIF by the employing establishment. Additionally, the record shows that appellant held the position for more than 60 days. While the evidence of record does establish that the employing establishment knew at the time appellant was placed in the modified electronics mechanic position that the position would be temporary in nature due to the impending RIF, as appellant had previously worked as an "on call" rather than permanent employee, the wage-earning capacity determination was proper.[12] Accordingly, the retroactive wage-earning capacity determination was proper. The Office properly determined that appellant's actual wages as a modified electronics mechanic effective September 14, 1994 fairly and reasonably represented her wage-earning capacity. These wages equaled the pay rate for the position she held when injured on July 22, 1994 and, therefore, the Office properly determined that appellant had no loss of wage-earning capacity.

[8] 5 U.S.C. § 8115(a).

[9] *Gregory A. Compton*, 45 ECAB 154, 156 (1993); *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (December 1993).

[11] *See Richard M. Knight*, 42 ECAB 320, 324 (1991). Disability is defined in the implementing federal regulations as "the incapacity, because of employment injury, to earn the wages the employee was receiving at the time of injury." 20 C.F.R. § 10.5(f). The Office applied the *Shadrick* principles in this case. It determined that appellant's pay rate when disability began was $576.00 per week; that the current pay rate for that same position was $576.00 per week; and that appellant's light-duty position paid $576.00 per week, which results in no loss of wage-earning capacity.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993).

The decisions of the Office of Workers' Compensation Programs dated April 28, 1997 and July 26, 1996 are affirmed.

Dated, Washington, D.C.
April 5, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member